INDEX

CITATIONS

Cases

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1050

CHARLES F. CONNORS, TRUSTEE IN BANKRUPTCY OF THE AGAWAM RACING AND BREEDERS' ASSOCIATION, INC.,

Petitioner,

v.

TOWN OF AGAWAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts is reported in 65 F. Supp. 755. The opinion of the United States Circuit Court of

Appeals for the First Circuit, filed January 7, 1947, is not as yet reported but appears on pages 88 to 97 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 7, 1947. (R. p. 98.) The petition for a writ of certiorari was filed on February 24, 1947. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The petitioner presented questions as set forth on pages 6 and 7 of its petition.

Not for the purpose of alleging any errors in the decisions of the Circuit Court of Appeals, but to clarify the real issues in the case, the respondent says that the issues are:—

1. Where petitions to foreclose tax liens on real estate have been brought in the Land Court of the Commonwealth of Massachusetts, a court of record and competent jurisdiction, against the equity owner of such real estate two and one-half years before the owner's adjudication in bankruptcy, and at the beginning of said Land Court proceedings notice of the filing of such Land Court proceedings was properly recorded in the Registry of Deeds according to state law and said owner was duly served, appeared, answered, and actively took part in the Land Court proceedings and hearings—is the Land Court deprived of jurisdiction to enter final decrees foreclosing the

tax liens when the owner is adjudicated a bankrupt two hours and ten minutes before the Land Court hearing at which motions to obtain final foreclosure decrees were allowed by that Court? Or can the Bankruptcy Court "snatch a res" from the Land Court's mouth by a mere adjudication in bankruptcy of a real estate owner who for more than two years unsuccessfully fought its case in the state court?

2. Where a debtor filed a petition for reorganization under Section 77B of the Bankruptcy Act on December 23, 1935, an order confirming the debtor's plan of reorganization was entered on December 27, 1937, said reorganization plan was fully consummated before July 1, 1938 (R. pp. 91 and 92), although no final decree was ever entered in the reorganization proceedings, does the reorganization court retain jurisdiction over the debtor's property sufficient to prevent a state court six years after the consummation of the plan from foreclosing a real estate tax lien acquired for taxes that accrued after the approval of and the consummation of the plan of reorganization?

3. A third issue arises from the respondent's motion to dissolve a restraining order issued by the Referee in Bankruptcy forbidding the Town to sell or transfer the real estate involved. Its outcome is dependent upon the issues of jurisdiction. As the owner of the lands by decrees of the Land Court, the Town asks that the restraining order be removed.

CONSTITUTION AND STATUTES INVOLVED

The applicable provisions of the Constitution and the federal acts and Statutes of the Commonwealth of Massachusetts are:

Article I, Section 8 of The Constitution; Sections 2(a) (15), 11e and 67a of the Bankruptcy Act, subsections a and h of old Section 77B of the corporate reorganization Act of June 7, 1934; Massachusetts General Laws (Ter. Ed.) Chapter 60, sections 37, 53, 54, 64, 65, 66, 68, and 69; Chapter 185, section 1(b), and Chapter 231, section 135. They are set forth in Appendix.

STATEMENT

The Agawam Racing and Breeders' Association, Inc. prior to 1935 owned and operated a race track in the Town of Agawam, Massachusetts, on a tract of land that was formerly known as the Bowles-Agawam Airport and which is described in three parcels on an exhibit (R. p. 3). On December 27, 1935, (R. p. 91) it filed a petition for corporate reorganization and the petition was approved and the debtor continued in possession. A plan of reorganization was approved on December 27, 1937. A trust indenture and a mortgage trust deed were executed in conformity with the plan and the court entered an order on the approval of their form. (R. pp. 87 and 92.) These particular trust indenture and mortgage trust deeds and orders thereon were omitted from the Record sent up with this case with the petition for certiorari—very likely because of their extreme length, each about fifty pages. But the Circuit Court of Appeals found from an examination of this evidence that the approved plan of reorganization had been consummated before July 1,

1938. (R. p. 92.) Despite this no final decree has ever been entered in that proceeding.

The Town admits that taxes due before 1937 have been paid. But though the Agawam Racing and Breeders' Association, Inc. owned and operated the race track in 1938, the taxes for the year 1938 were not paid nor has any payment of taxes been made on any taxes assessed for subsequent years (R. p. 15).

Because of the failure of the Agawam Racing and Breeders' Association, Inc. to pay the 1938 taxes, the Town of Agawam, under the provisions of Massachusetts General Laws (Ter. Ed.) c. 60, sections 53 and 54, acquired title to these lands by three instruments of taking dated August 23, 1939, which were duly recorded in the Hampden County Registry of Deeds on August 29, 1939,—approximately five years before the adjudication in bankruptcy. (R. pp. 50 and 51.)

By virtue of General Laws (Ter. Ed.) c. 60, s. 54, "title to the land so taken shall thereupon vest in the town, subject to the right of redemption."

The state law, General Laws (Ter. Ed.) c. 60, s. 65, requires that two years must elapse from the date of the taking before the holder of such a title may petition the Land Court of the Commonwealth to foreclose all rights of redemption.

The Land Court has exclusive jurisdiction of the foreclosure of all rights of redemption from tax taking. General Laws (Ter. Ed.) c. 60, s. 64; c. 185, s. 1.

The Town of Agawam duly awaited the lapse of two years and on November 26, 1941, filed its petitions to foreclose the rights of redemption under the tax taking titles it held. (R. pp. 51 and 52.) And in like conformity with the state law, notices were recorded in the Hampden County Registry of Deeds that peti-

tions to foreclose the tax liens were filed in the Land Court. (R. p. 51.)

These tax takings in addition to vesting title in the Town are also held under the provisions of General Laws (Ter. Ed.) c. 60, ss. 60 and 61, as security for the repayment of taxes with all intervening costs, charges, and interest, and subsequent taxes assessed thereon until redemption or until foreclosure of the rights of redemption in the Land Court as provided in Chapter 60.

After the petitions to foreclose were filed in the Land Court, the title was referred to a Land Court examiner and upon the receipt of his report, the Land Court issued a citation to all parties, returnable January 12, 1942, all in conformity with General Laws (Ter. Ed.) c. 60, s. 65. The Agawam Racing and Breeders' Association, Inc. appeared and answered to that petition on January 9, 1942. (R. p. 52.) In its answer, the Agawam Racing and Breeders' Association, Inc. did not deny the validity of the Town of Agawam's title but simply prayed for further time to redeem (Exhibit, R. p. 81).

Thereafter there were a series of hearings before the Land Court on May 28, 1942, November 14, 1942, March 3, 1943, June 29, 1943, January 6, 1944, June 14, 1944, and July 14, 1944. (R. pp. 52, 53, 54.) The Land Court gave the Agawam Racing and Breeders' Association, Inc. opportunity to redeem by continuing the cases from time to time for that purpose over a period of two years. On January 6, 1944, the Land Court extended the time to redeem to April 20, 1944, and on April 18, 1944, again extended the time to redeem to June 19, 1944. On the latter date the Town of Agawam, because of the bankrupt's failure to redeem, filed its motions for final decrees to foreclose.

These motions were continued for hearing until July 14, 1944, at twelve noon. (R. p. 53.)

It is to be particularly noted that the hearings on the motions for final decrees foreclosing the rights of redemption were assigned for twelve o'clock noon on July 14, 1944, (R. p. 53) and the hearing assignment was made on June 19, 1944.

In these circumstances, the evidence discloses that at 9:50 A.M. on the morning of July 19, 1944,—two hours and ten minutes before the assigned hearing in the Land Court—the bankrupt filed its voluntary petition to be adjudicated a bankrupt in the United States District Court, obtained an immediate adjudication, and an immediate referral of the case to Arthur Black, Referee in Bankruptcy. (R. p. 55.) Then counsel for the Agawam Racing and Breeders' Association, Inc. in the Land Court, who was afterward appointed counsel for the Receiver, secured a letter from the Referee addressed to the Town of Agawam's counsel and a copy of the same letter directed to Judge Fenton of the Land Court, in which a request was made to the Land Court to hold up proceedings in that court because of the bankruptcy. (R. p. 16.) Counsel for the bankrupt went to the Land Court and testified that he notified Judge Fenton of the bankrupt's adjudication and delivered a copy of the Referee's letter to him. (R. p. 55.) (The record of the Land Court shows that notice of the adjudication in bankruptcy was not filed in that court until July 19, 1944. [R. p. 53.])

Judge Fenton proceeded to a hearing and after the hearing allowed on that day—July 14, 1944—the Town of Agawam's motions for final decrees, as appears by the record of that court.

Thereafter the Referee in Bankruptcy appointed

Daniel W. Gurnett, receiver, and upon his application issued, on July 19, 1944, a temporary restraining order designed to restrain the Town of Agawam and its officials "from proceeding, dealing with or in any way impairing the right to redeem presently in the bankrupt estate" and "from conveying, transferring or in any way dealing with or encumbering any property" of the bankrupt.

At the time this restraining order was issued, the motions to foreclose the rights of redemption had been allowed by the Land Court, which the bankrupt and the Receiver knew or should have known, and all that remained was the mechanics necessary for the drawing up of the final decrees and their entries on the official records of the Land Court. And in effect the application by the Receiver for the restraining order and its issuance by the Referee in Bankruptcy was an indirect way of attempting to stay the proceedings of a state court—a power which the Referee in Bankruptcy does not have under the Bankruptcy Act (section 2 [a] 15).

On July 19, 1944, the Receiver appeared in the Land Court by counsel with a petition to stay the entry of the final decrees foreclosing the right of redemption in that court. The court assigned that petition for hearing on July 21 at 11 A.M. and, after hearing, the petition for stay of proceedings was denied on July 21 and the final decrees foreclosing the rights of redemption were formally entered on the same day. (R. p. 53.)

Thereafter the Receiver appealed from the Land Court decrees, but he failed to perfect his appeals in accordance with General Laws (Ter. Ed.) c. 231, s. 135, and consequently the appeals were ineffective and the Land Court final decrees stand.

But it is to be noted, in view of the reference in the

comment of the Circuit Court of Appeals that "the trustee was entitled to a stay of the Land Court proceedings for sixty days after adjudication in order to decide whether redemption was advisable and if so to act accordingly," that the trustee in bankruptcy did act by filing a petition in the Land Court to stay (R. p. 53); and that although this petition was denied, he appealed and kept the case open on appeal to October 13, 1944 (R. p. 54)—a period of three months after the bankruptcy adjudication. It was on and after October 13, 1944, that the trustee failed to perfect his appeal to the Supreme Judicial Court.

In the present proceedings, the Trustee in Bankruptcy seeks an order from the bankruptcy court to sell these same properties "free and clear" of liens (R. pp. 1 and 12). Without submitting to the jurisdiction of the bankruptcy court, (R. pp. 8 and 12) the Town of Agawam came in and answered by stating that the bankrupt estate does not own the properties and that by the final decrees in the Land Court, the full title, and not simply a lien, of these properties is in the Town of Agawam, and that the Trustee has no right to sell them. And in a separate petition the Town of Agawam prays that the restraining order of July 19, 1944, be vacated.

SUMMARY OF ARGUMENT

1. Where a town commences proceedings to foreclosure rights of redemption of a five year old valid real estate tax lien in the Land Court of Massachusetts, a state court of competent jurisdiction, more than two and a half years before the bankruptcy adjudication of the equity owner of such real estate, the federal court

as a court of bankruptcy is without jurisdiction to enjoin the state court foreclosure action.

2. In the circumstances stated in paragraph 1, it is the right and duty of the state court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject matter shall not be interfered with—if the lien was acquired four months or more before bankruptcy.

3. *Gardner* v. *New Jersey*, U. S., 91 Law Ed. 410, 15 U. S. Law Week 4171, decided January 20, 1947, is not applicable to the case at bar for (1) no conflict of jurisdiction with a state court was involved in the *Gardner* case; and (2) the State of New Jersey submitted to the jurisdiction of the reorganization court in filing and prosecuting its tax claim, while the Town of Agawam did not submit to the jurisdiction of the bankruptcy court (R. pp. 8 and 12).

4. Cases cited by the petitioner are not applicable to the present case for they concern cases where the liens were acquired within four months of bankruptcy or where, after bankruptcy proceedings were commenced, actions to enforce the liens were brought in the state courts.

5. The Land Court of Massachusetts had constructive possession of the res and jurisdiction of the parties and the res in the tax lien foreclosure proceedings more than two years before the bankruptcy adjudication.

6. Reorganization proceedings of the bankrupt under Section 77B of the Bankruptcy Act had no effect on the Land Court jurisdiction in the tax lien foreclosure proceeding for the reorganization plan was approved

and consummated prior to the accrual of taxes involved in the present case and three years before proceedings were commenced in the Land Court to foreclose the tax lien.

7. If the bankrupt was entitled to redeem the property from the tax lien within sixty days after the bankruptcy adjudication under Section 11e of the Bankruptcy Act, it did not do so. In effect, it had ninety-one days after the Land Court decree to exercise any such right by virtue of appeal taken to the Supreme Judicial Court and subsequently abandoned; during the sixty day period the situation had not been changed because of an injunction issued by the Referee in Bankruptcy; and if the bankrupt was aggrieved by the decree of the Land Court denying its petition for stay of proceedings, the proper redress was by appeal to the Supreme Judicial Court. Since the bankrupt did not redeem within the sixty day period, the question has become moot. The final decree of the Land Court became res adjudicata in the case when the bankrupt abandoned its appeal.

8. There is no conflict of decisions of other Circuit Courts of Appeals with the decision of the Circuit Court of Appeals for the First Circuit rendered in this case. This Court has denied certiorari in similar cases. The law of this case has been plainly settled in the case of *Straton* v. *New*, 283 U. S. 318, at 331.

9. Respecting the petitioner's argument concerning "forfeiture" of its property, forfeiture is a necessary adjunct to the taxing power of governments—federal, state and local; and Massachusetts gives every right a taxpaper has under the Constitution of the United States to appear and be heard before its administrative

taxing boards and its courts, rights which were availed by the bankrupt.

10. The decision of the Circuit Court of Appeals for the First Circuit is so clearly correct that no further review would be warranted.

ARGUMENT

Where local tax lien foreclosure proceedings are commenced in a state court of competent jurisdiction more than two years and a half before the bankruptcy adjudication of the equity owner of the real estate involved, the federal court is without jurisdiction to enjoin the state court foreclosure action.

It is to be observed at the outset that:

a. The tax takings the Town of Agawam had which vested in it title to the lands involved were acquired four years and nine months prior to the bankrupt's adjudication (R. p. 50). Massachusetts General Laws (Ter. Ed.) c. 60, s. 54, set forth in Appendix.

b. More than two and a half years prior to the adjudication the Town of Agawam invoked the Land Court to foreclose the rights of redemption (R. pp. 51 and 52).

c. From January 9, 1942, (R. p. 52) the Land Court had jurisdiction over the Agawam Racing and Breeders' Association, Inc. (which filed its voluntary petition for bankruptcy on July 14, 1944), the Town of Agawam, and the real estate involved.

d. The original tax liens were recorded in the proper registry of deeds on August 29, 1939 (R. p. 51);

notices of the petition to foreclose the tax liens in the Land Court were duly recorded in the registry of deeds on November 25, 1941 (R. p. 51); the bankrupt appeared and answered in the Land Court proceedings on January 9, 1942; and the Land Court had complete jurisdiction of the res involved and of all the parties.

e. The acquisition of the tax titles by the Town were in conformity with the applicable state statutes (R. p. 15) and no question was raised by the bankrupt concerning their validity.

f. The tax title foreclosure proceedings were performed in strict accord with state statutory and Land Court requirements (R. p. 15).

g. At intervals from May 28, 1942, to July 14, 1944, the Land Court heard all the parties and entered orders for redemption of tax liens (R. pp. 52 and 53).

h. When it became apparent that the Land Court would at a hearing scheduled for noon on July 14, 1944, enter a decree foreclosing the rights of redemption, the bankrupt (two hours and ten minutes before the scheduled hearing) went into voluntary bankruptcy—in an effort to delay further the litigation which the Land Court had patiently considered over a period of two years.

i. The Land Court decrees entered July 21, 1944, gave the Town of Agawam absolute title to the real estate. Massachusetts General Laws (Ter. Ed.) c. 60, s. 64, set forth in Appendix—and those decrees not appealed from, still stand.

It is settled law that if a state court, four months or more before a petition for adjudication in bankruptcy is filed, is invoked by the holder of a tax lien to fore-

close rights of redemption under the state court's powers under applicable state statutes, and if the taxpayer or lienor appears and answers in the state court four months or more before the petition in bankruptcy is filed, the state court has complete jurisdiction over the bankrupt and the property involved and that jurisdiction is not divested by proceedings in bankruptcy.

Straton v. *New*, 283 U. S. 318.

Pickens v. *Roy*, 187 U. S. 177, 180.

Emil v. *Hanley*, 318 U. S. 515.

Muffler v. *Petticrew Real Estate Co.*, 132 F. (2d) 479 (6th Cir.). Certiorari denied June 7, 1943, 319 U. S. 766.

Drusilla Carr Land Corp., 107 F. (2d) 565, CCA (7th Cir.).

In Re Tinkoff, 141 F. (2d) 731, CCA (7th Cir.).

Dannel v. *Wilson-Weesner-Wilkinson Co.*, 109 F. (2d) 364 (6th Cir.).

In Re Greenlie-Halliday Co., 57 F. (2d) 173 (2d Cir.).

Bryan v. *Speakman*, 53 F. (2d) 463 (5th Cir.).

In Re Maier Brewing Co. Inc., 65 F (2d) 673 (9th Cir.).

Straton v. *New*, 283 U. S. 318, held:

(1) That liens acquired more than four months before bankruptcy proceedings are instituted, if valid under state law, are preserved and will be accorded priority in the distribution of the estate in accordance with local law; but it also declared

(2) That when under liens acquired prior to the four months' period, a state court has been invoked and has acquired jurisdiction of the res for the purpose of enforcing the lien, the bankruptcy court has no power to enjoin the continuation of such action.

It is on this latter point that the principal conflict comes between the petitioner and this respondent. The petitioner cites *Isaacs* v. *Hobbs Tie and Timber Company*, 282 U. S. 734, and *Gross* v. *Irving Trust Company*, 289 U. S. 342, and similar cases which speak of the Bankruptcy Court's paramount and exclusive jurisdiction to deal with property of the bankrupt. But in the *Isaacs* case, the suit in the state court to foreclose a mortgage on land was not begun four months before the bankruptcy; it was begun after the bankruptcy adjudication and, of course, the bankruptcy court having prior jurisdiction had "paramount jurisdiction" over the state court proceeding. And in the *Gross* case, as well as in the case of *Taylor* v. *Sternberg*, 293 U. S. 470, it was held that where receivership proceedings were brought in a state court within four months prior to bankruptcy, the bankruptcy court by virtue of the bankruptcy act ousts the state court of jurisdiction.

But not one case in the petitioner's brief holds that a bankruptcy court can oust a state court of jurisdiction where actual proceedings to enforce the lien were brought in the state court more than four months before bankruptcy.

In such circumstances this court has held in *Pickens* v. *Roy*, 187 U. S. 177, 180, that it is "the right and duty" of the (state) court "to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject matter shall not be interfered with."

Straton v. *New*, 283 U. S. 318, 326, states:

> " . . . the federal courts have with practical unanimity held that where a judgment which constituted a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of real estate."

And in the same *Straton* v. *New* case, the court in making its decision considered the same arguments that the petitioner herein makes in his brief—that by the mere adjudication in bankruptcy, the bankruptcy court acquires paramount jurisdiction over state courts. But the court in the *Straton* v. *New* case, at page 331, in forceful language said:

> "Most of the cases cited by the appellees to the effect that the initiation of bankruptcy proceedings confers on the district court jurisdiction to enjoin pending suits in state courts deal with a situation where the lien was acquired within four months of the filing of the petition, or where, after the filing of the petition an action was begun to enforce a lien valid in bankruptcy. As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings, brought prior to the filing of the petition, to enforce valid liens which are more than four months old at the date of bankruptcy; but these cases are contrary to the decisions of this Court and to the great weight of judicial authority."

This Court and the federal courts strongly maintain the doctrine enunciated in the *Straton* v. *New* case to preserve comity between the state and federal courts and prevent conflicts and confusion that would arise if the doctrine were otherwise. The extent to which this Court has gone to maintain this doctrine can be appreciated by considering the opinion in *Emil, Trustee in Bankruptcy*, v. *Hanley*, 318 U. S. 515. That case concerned the interpretation of section 2(a) (21) of the Chandler Act of 1938 that requires receivers and trustees appointed by courts other than bankruptcy courts, within four months of bankruptcy, to deliver over assets to the bankruptcy receiver or trustee and account to the bankruptcy court. In that case a receiver in a mortgage foreclosure proceeding was appointed by a state court within the four month period to collect rents. And the United States Supreme Court held, after frequently citing the law in *Straton* v. *New*, that this section of the Bankruptcy Act was inapplicable to straight bankruptcy proceedings. And in referring to what the opposite conclusion would bring about, the Court said at page 521:

> "Moreover such an interpretation would lead in many cases to a division of authority between state and federal courts. Thus in this case the state court would remain in charge of the foreclosure and the bankruptcy court would have exclusive control over the receiver's receipts. An interpretation which leads to a division of authority so fraught with conflict will not be readily implied."

GARDNER V. STATE OF NEW JERSEY IS INAPPLICABLE TO PRESENT CASE

The petitioner argues at length in his brief that the case of *Gardner* v. *State of New Jersey*, U. S., decided January 20, 1947, 91 Law Ed. U. S. Advance Opinions, 410; 15 U. S. Law Week 4171, "warrants the granting of his petition for a writ of certiorari."

The *Gardner* case was a 77B railroad reorganization proceeding. But it is not like the present case in many respects, the chief difference being that there was no litigation pending in a state court to enforce whatever tax liens the State of New Jersey may have had on the railroad property when the railroad filed its 77B reorganization petition. True there had been considerable litigation over the taxes involved as set out in *In Re Central Railroad Company of New Jersey*, 152 F. (2d) 408, 408 to 411, and the Circuit Court of Appeals decision in the same case, but each and every prior litigation case concerned petitions to abate or reduce taxes or tax valuations. Not one of them concerned an action or suit in a state court to collect the tax by tax lien foreclosure or otherwise. As clearly stated in the first paragraph of the United States Supreme Court opinion, the railroad corporation "filed its petition for reorganization in 1939 shortly after receiving notice from the Attorney General of New Jersey that he would apply to a state court for a summary judgment for unpaid taxes of the debtor and seek to sell its property in satisfaction of the judgment." In other words, there was no suit pending in the state against the property of the railroad to enforce a lien. New Jersey was just about to start one when 77B reorganization intervened. So there was no conflict of jurisdiction.

Secondly, the *Gardner* v. *New Jersey* case differs from this case in another important aspect. After the 77B reorganization, New Jersey "invoked the aid of the bankruptcy court by offering a proof of claim and demanding its allowance." It was the "actor" and as such had to abide by the judgment of the reorganization court on its own proof of claim. But in the instant case, the Town of Agawam never consented or submitted to the jurisdiction of the bankruptcy court. (R. pp. 8, 12, 91.) It has consistently relied on the Land Court decrees.

Thirdly, *Gardner* v. *New Jersey* in no way conflicts with *Straton* v. *New*, 283 U. S. 318. It cites the first part of the *Straton* v. *New* decision as outlined in paragraph 1 on page 14 of this brief in support, but it had no occasion to refer to the last part of the *Straton* v. *New* decision as outlined in paragraph 2 on said page 15 for the simple reason that there did not appear in the case a conflict of jurisdiction with a state court arising out of a tax lien foreclosure commenced in the state court four months prior to the reorganization petition.

Gardner v. *New Jersey* in no way refutes or changes the well recognized law that when a court of competent jurisdiction has a res in custodia legis, such res is withdrawn from the jurisdiction of all other courts, which though of concurrent jurisdiction, may not disturb that possession; and that it is the right and duty of the court originally acquiring jurisdiction to proceed to final decree and determine all questions relating to title, possession and control of the property.

Other cases that the petitioner relies upon to advance its contentions that the bankruptcy court has

paramount jurisdiction over state courts and that a bankruptcy adjudication ipso facto ousts a state court of jurisdiction and enjoins all state court proceedings involving the bankrupt are: *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734; *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Steelman* v. *All Continent Corp.*, 301 U. S. 278; *Meyer* v. *Fleming*, decided February 4, 1946, 90 Law Ed. 423, 66 S. Ct. 382, 14 L.W. 4132; *Van Huffel* v. *Harkelrode, Treasurer*, 284 U. S. 225.

It is true that in the case of *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734, at 737, the Court said "Upon adjudication, title to the bankrupt's estate vests in the trustee with actual or constructive possession and is placed in the bankruptcy court. . . . It follows that the bankruptcy court has exclusive jurisdiction to deal with property of the bankrupt estate."

Every case cited by the court to support that statement concerned cases that were brought in the state court after bankruptcy adjudication. And continuing in the same paragraph in the *Isaacs* case as the above quoted statements appear, the Court said (282 U. S. 734, at 737):

> "This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear all questions respecting title, possession and control of the property."

That is the very principle that the Town of Agawam contends: that the Land Court having first acquired

jurisdiction can not have its jurisdiction disturbed by the bankruptcy court. And *Straton* v. *New*, 283 U. S. 318, very clearly points out that the *Isaacs* case applies to cases brought into state courts *after* the bankruptcy proceedings are commenced. *Heffron* v. *Western Loan and Building Co.*, 84 F. (2d) 301, certiorari denied, 299 U. S. 597. In the *Isaacs* case, the suit to foreclose a mortgage on land in a state court was begun after the owner had been declared bankrupt.

In *Gross* v. *Irving Trust Company*, 289 U. S. 342, and *Taylor* v. *Sternberg*, 293 U. S. 470, it was held that where receivership proceedings are brought in a state court and within four months thereafter bankruptcy proceedings are brought in the federal courts, the bankruptcy court as a court of paramount jurisdiction ousts the state court of its jurisdiction.

The obvious reason why the bankruptcy court was declared to have paramount jurisdiction in the *Gross* and *Taylor* cases is that The Constitution (Art. I, Sec. 8, cl. 4) does vest Congress with paramount authority to make uniform laws concerning bankruptcies; that when Congress enacts a bankruptcy act that act is therefore supreme; and, when the courts exercise jurisdiction conferred upon them by such a statute, they are exercising a paramount and exclusive jurisdiction. But it is necessary that the jurisdiction so exercised be within the powers conferred upon the courts and within the terms of the bankruptcy act. And when liens on property are more than four months old and state court proceedings are commenced four months or more before bankruptcy in the state courts, no provision of the ordinary bankruptcy act authorizes the bankruptcy court to oust the state court of jurisdiction in proceedings to enforce liens valid under the very terms (Sec.

67a-1) of the bankruptcy act. The Congress has the constitutional power to make the federal courts all paramount over the state courts as it has exercised in the enactment of the Frazier-Lempke Act providing that upon the filing of a petition under section 75 of the Bankruptcy Act, all the property of the farmer becomes immediately subject to the "exclusive" jurisdiction of the federal court. Bankruptcy Act, Sec. 75(N) (11 U.S.C. s. 203 N). But no such power is given the federal courts in the ordinary bankruptcy sections of the act over state courts enforcing liens more than four months old by proceedings begun four months before bankruptcy. The Congress has limited the jurisdiction of the bankruptcy court in the same manner as it has limited its powers in other bankruptcy matters. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426.

Steelman v. *All Continent Co.*, 301 U. S. 278, 291, does not sustain the petitioner's claim. It is authority for the contention that the court which first gets jurisdiction retains it. The court held that a bankruptcy court, having jurisdiction, can issue an injunction directed against a suitor, and not a court, if the "suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong" for "suits as well as transfers may be protective coverings of fraud." There is no claim in this case that the Town of Agawam did not properly invoke two and a half years or more before the bankruptcy adjudication the jurisdiction of the Land Court to enforce its statutory rights—or that the Land Court had a hypothetical jurisdiction over the res—or that any attempt was made to misuse the Land Court into an instrument of wrong. The consideration that the Land Court

gave this bankrupt in making the extensions over a period of more than two years to allow it to redeem, shows quite the contrary.

Myer v. *Fleming*, decided on February 4, 1946, 90 Law Ed. 423, 66 S. Ct. 382, 14 L.W. 4132, cited by the petitioner is likewise not applicable to the present case. It was a stockholder's derivation suit instituted before 77B reorganization; it did not concern the enforcement of a lien on particular property of the debtor brought in a state court before the 77B proceedings. The debtor was only a nominal party.

Van Huffel v. *Harkelrode, Treasurer*, 284 U. S. 225, cited by the petitioner, is authority for the sale of lands owned by the bankrupt free and clear of liens, including tax liens. But in that case it did not appear that the tax collector had invoked the powers of the state court. If in the instant case, bankruptcy had intervened in 1941 before the tax lien foreclosure proceedings started in the Land Court, the bankruptcy court could sell the assets free and clear of tax liens acquired by the town in 1939 under the authority of the *Van Huffel* case. But when the state court's powers were invoked to foreclose the tax lien and that court had jurisdiction of the parties and the res two and a half years before bankruptcy, the *Van Huffel* case is not authority for the ousting of the state court of its jurisdiction and its power to proceed to final decree.

Decisions of lower courts that support the respondent's argument above set forth are:

Heffron v. *Western Loan and Building Co.*, (9th Cir.) 84 F. (2d) 301. Certiorari denied November 16, 1936, 299 U. S. 597. (Mortgage foreclosure one day

after bankruptcy held valid when mortgage was more than four months old, following *Straton* v. *New*, 283 U. S. 318, and differentiating *Gross* v. *Irving Trust Co.*, 289 U. S. 342, and *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734.)

Muffler v. *Petticrew Real Estate Co.*, (6th Cir.) 132 F. (2d) 479. Certiorari denied June 7, 1943, 319 U. S. 766. (Mortgage foreclosure proceedings commenced in state court more than four months before bankruptcy, and pending at the time of adjudication, held valid and bankruptcy court did not have jurisdiction to stay the state court proceedings.)

Bryan v. *Speakman*, (5th Cir.) 53 F. (2d) 463. Certiorari denied, 285 U. S. 539.

In Re Greenlie-Halliday Co., (2nd Cir.) 57 F. (2d) 173. This was another foreclosure suit in a state court which held that the state court having constructive possession of the res and having been the first one to acquire jurisdiction has the power to hear and determine all controversies relating thereto and for a time disables other courts of coordinate jurisdiction from exercising like power. The court then adds: "In bankruptcy, as in equity, one court will not snatch a res from another's mouth."

In Re Maier Brewing Co., Inc., (9th Cir.) 65 F. (2d) 673. Certiorari denied, 290 U. S. 695.

Dannel v. *Wilson-Weesner-Wilkinson Co.*, (6th Cir.) 109 F. (2d) 364.

In Re Tinkoff, (7th Cir.) 141 F. (2d) 731.

In Re Drusilla Carr Land Corp., (7th Cir.) 107 F. (2d) 565.

LAND COURT HAD CONSTRUCTIVE JURISDICTION AND POSSESSION OF THE RES.

The tax liens in this case were security for the taxes due. Massachusetts General Laws (Ter. Ed.) c. 60, s. 37 (quoted in Appendix). *Donovan* v. *Haverhill*, 247 Mass. 69. The Land Court is the only court under Massachusetts law with power to enforce tax liens. Massachusetts General Laws (Ter. Ed.) c. 60, s. 64 (quoted in Appendix). It is a court of record. Massachusetts General Laws (Ter. Ed.) c. 185, s. 1. "It has exclusive jurisdiction of the proceedings to foreclose the rights of redemption from tax titles under c. 60 (see s. 64)." *Bell* v. *Eames*, 310 Mass. 642, 645.

The Land Court had not only jurisdiction of the parties but prior constructive jurisdiction of the res. The petitions to foreclose the tax title rights of redemption described the particular property. The tax takings described the particular property (R. p. 50). In accordance with state law notices were recorded in the registry of deeds that petitions had been filed in the Land Court (R. p. 51). Furthermore, citations were issued by the Land Court to all persons interested in the land and the Agawam Racing and Breeders' Association, Inc. appeared, answered, and actively participated in the hearings for over two years. These acts are of equivalent import to actual seizure and they stand for and represent the dominion of the Land Court over the particular properties and subject them to the control of the Land Court. They gave the Land Court constructive possession. *Cooper* v. *Reynolds*, 10 Wall 308, 317, where the court said:

> " . . . while the general rule in regard to jurisdiction in rem requires the actual seizure and

> possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing and in effect subject it to the control of the court. Among the latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying in the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court."

See also *In Re Maier Brewing Co.*, 65 F. (2d) 673 (9th Cir.); *Dannel* v *Wilson-Weesner-Wilkinson Co. et al.*, 109 F. (2d) 364 (6th Cir.).

The property was in custodia legis of the Land Court. And it is "a settled principle that no other court is allowed to interfere with property thus in custodia legis." *Chandler* v. *Perry*, 74 F. (2d) 371, 372.

This being so, we conclude this part of the argument by referring to the recent case of *Heiser* v. *Woodruff*, decided by the United States Supreme Court on April 22, 1946, 66 Sup. Ct. Rep. 853; 90 L. Ed. Adv. Ops. 828; 14 U. S. Law Week 4316. In connection with this case it is pointed out that the Land Court litigation of two or more years before adjudication was followed by the appearance in the Land Court by the receiver of the bankrupt who filed pleadings for a stay of proceedings in the Land Court, was fully heard by the Land Court, and the issue decided against him by that court. (R. p. 53.) It is pointed out that by the decision in the *Heiser* v. *Woodruff* case, the matter has become res adjudicata for in the *Heiser* case, the court says at 856:

"But we are aware of no principle of law and equity which sanctions the rejection by a federal court of the salutary principle of res adjudicata, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue decided against him, he may not later renew the litigation in another court. *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, 525-526.

"And it is well settled that where the trustee in bankruptcy unsuccessfully litigates an issue outside the bankruptcy court, the decision against him is binding on the bankruptcy court. *Davis* v. *Friedlander*, 104 U. S. 570; *Fischer* v. *Pauline Oil Co.*, 309 U. S. 294, 302-303."

And on page 858, "But it is quite another matter to say that the bankruptcy court may reexamine issues determined by the judgment itself. It has, from an early date, been held to the contrary."

The Town of Agawam urges that the principles of the *Heiser* case and the other cases cited be adopted by holding that the federal court has no jurisdiction to disturb the Land Court decrees or the matter is res adjudicata.

The prior 77B proceedings had no effect on Land Court proceedings for reorganization plan was approved and consummated prior to the accrual of taxes, and tax title foreclosure proceedings in Land Court did not commence until three years thereafter.

No question was raised by the petitioner or the district court that the Land Court did not have proper jurisdiction over the tax title foreclosure proceedings.

After the hearing in the Circuit Court of Appeals, at the request of the court, the parties submitted memoranda and further briefs and the Circuit Court of Appeals found (R. pp. 91 and 92) that the plan of reorganization of the debtor had been approved on December 27, 1937, and consummated before July 1, 1938,—three years before the Land Court proceedings were started. And yet though all the reorganization acts were performed, the formality of entering a final decree never was made. The Circuit Court of Appeals found that the Land Court was unfettered by any prior jurisdiction as the result of the 77B reorganization proceedings (R. p. 92) because "the confirmation and consummation of the plan of reorganization suffice to effect a release of the reorganized corporation's property from the jurisdiction of the bankruptcy court."

This conclusion of law is sustained by seven decisions of the Circuit Court of Appeals for the Second Circuit and by one of the Circuit Court of Appeals for the Third Circuit.

North American Car Corporation v. *Peerless Weighing and Vending Machine Corporation*, (2nd Cir.) 143 F. (2d) 938, at 940, holds that "it is the confirmation and consummation of the plan which is the culminating point of the entire proceedings; and it is unnatural, as well as inequitable, to deny finality to a fully consummated plan until the court chooses to write 'finis' in some formal legal language for the clerk to copy into the court records . . . ." Debtors can not be held "in tutelage indefinitely."

In Re Ambassador Hotel Corporation, (2nd Cir.) 124 F. (2d) 435.

Baker's Share Corporation v. *London Terrace*, (2nd Cir.) 130 F. (2d) 157, holding that the reorganization court can not reserve to itself power to adjudicate controversies between the reorganized debtor and future creditors.

Reese v. *Beacon Hotel Corporation*, (2nd Cir.) 149 F. (2d) 610, holding that any reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court.

Towers Hotel Corporation v. *Lafayette National Bank*, (2nd Cir.) 148 F. (2d) 145.

In Re Flatbush Avenue-Nevins St. Corporation, (2nd Cir.) 133 F. (2d) 760.

See also *Continental Bank and Trust Company of New York* v. *Scotch Presbyterian Church*, 57 N. Y. S. (2d) 128.

Bell v. *Roberts*, (3rd Cir.) 112 F. (2d) 585, holding that "when the reorganization was consummated the protecting hand of the bankruptcy court was withdrawn from the new company and its assets"—and it directed a creditor of the reorganized debtor to go into the state court to enforce his claim for the federal court did not have jurisdiction.

Clinton Trust Co. v. *John H. Elliott Leather Co.*, (2nd Cir.) 132 F. (2d) 299, holding that upon confirmation and consummation of the plan the debtor is a "reorganized debtor" and not a "debtor in possession" and the reorganization court is not authorized to exer-

cise control over the management of the reorganized debtor's business.

The case of *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, cited by the petitioner, is not in conflict with the eight Circuit Courts of Appeals decisions above cited. The issue in that case involved a right to appeal to a Circuit Court of Appeals from a District Court order confirming a 77B plan of reorganization. The court held that the confirmation of a plan was but a step in the administration of the debtor's estate. On page 165 the Court said: "The release of the debtor in a reorganization proceeding is contingent upon the performance of its part of the reorganization plan."

If the debtor wanted to obtain a discharge of its old debts and liabilities, he should obtain a final decree. But when the reorganization plan is consummated, title of the debtor's property passes to new mortgagees, trust indenture holders, or whatever persons are employed to carry out the plan. To hold that nothing passes until the final decree is entered would invalidate the claims of the new mortgagee and trust indenture holders. And as a practical matter, when property passes from a "debtor in reorganization" to a "reorganized debtor" upon consummation of the plan, jurisdiction of the reorganization court over the res so transferred ceases because of the variety of reasons given in the eight Circuit Courts of Appeals decisions.

CONCERNING THE BANKRUPT'S RIGHTS TO A STAY OF PROCEEDINGS IN THE LAND COURT

The petitioner on page 20 of his brief states that under Section 11e (11 U. S. C. Sec. 29e), 1940 of the

Bankruptcy Act, the bankruptcy estate was entitled to a stay of proceedings of not less than sixty days. However, in his brief he does not argue that the denial of the petition to stay would invalidate the subsequent foreclosure decree of the Land Court although in the petition for the writ of certiorari (page 7, paragraph 5) he poses the question. The Circuit Court of Appeals (R. p. 96) said that a section of said section 29e "would seem to indicate that if the period of redemption was still open after June 19, 1944, the trustee was entitled to a stay of the Land Court proceedings for sixty days after adjudication of bankruptcy in order to decide whether redemption was advisable and if so to act accordingly."

By Sec. 11(e) of the Bankruptcy Act the trustee is given sixty days after the adjudication to act in a state court proceeding or by applicable federal or state law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy . . . ."

This is a new provision of the Bankruptcy Act. *Collier on Bankruptcy*, 14th Edition, Volume 1, s. 11.13, pages 1185, 1189, says it marks an entirely new departure in bankruptcy and is designed to cover certain special situations so as to give the trustee sixty days' time to decide whether to do or not to do a certain act.

It appears in this case that four days after adjudication the receiver determined to apply for a stay of proceedings (R. p. 53) and went to a hearing on his petition seven days after adjudication, and his petition for a stay was denied (R. p. 53). Now if the Land Court erred, his rights were to appeal by way of exceptions to the Supreme Judicial Court of Massachu-

setts (Massachusetts General Laws [Ter. Ed.] c. 231, s. 113), and an appeal was so taken on August 8, 1944, (R. p. 53) and the petitioner had until October 13, 1944 (R. p. 54)—ninety-one days after the adjudication—to effect his appeal. The trustee failed to perfect his appeal in the ninety-one day period and the decree of the Land Court, consequently, was a final decree and made the matter "res adjudicata." "Its (the Land Court's) decisions and decrees in subject matters within its jurisdiction can not be attacked collaterally." *Bell* v. *Eames*, 310 Mass. 642, 645. See also *Angel* v. *Bullington*,—U.S.—decided February 17, 1947, 15 L. W. 4247; *Heiser* v. *Woodruff*,—U.S.—decided April 22, 1946, 66 Sup. Ct. Rep. 853; 90 L. Ed. Adv. Ops. 828; 14 U. S. Law Week 4316. And in Massachusetts a judgment *in rem* is binding on all the world, and such an "adjudication is held to be conclusive upon the facts which are made the ground of the judgment, when those facts are again brought in question in ulterior or collateral proceedings." *Salem* v. *Eastern Railroad*, 98 Mass. 431, 449. *Butrick, petitioner*, 185 Mass. 107, 113. *Sheehan Construction Co.* v. *Dudley*, 299 Mass. 51.

Furthermore it appears in evidence that on July 19, 1944, the Referee in Bankruptcy enjoined the Town of Agawam from selling or in any way disposing of the property. (R. pp. 9, 17, 44, 57.) That injunction still stands and is one of the subjects of this petition. Its effect was that the res remains in status quo.

So by the attempted appeal to the Supreme Judicial Court and by the injunction, the trustee in bankruptcy had far more than sixty days to decide whether or not to redeem the tax title. The section of the Bankruptcy Act above quoted does not direct a state court to stay

proceedings; rather it gives a federal statutory right to the trustee to redeem the tax title in sixty days. Under the circumstances of this case, the trustee could have done so within the sixty day period, but he did not. The question has become moot. The trustee had every opportunity to redeem within the sixty day period, if he had decided to do so. Even if this issue were properly here, in a proceeding reviewing alleged errors of the Land Court, it would be harmless error.

ALLEGED CONFLICT OF DECISIONS

The petitioner claims that the decision of the Seventh Circuit Court of Appeals in *In Re Argyle-Lake Shore Building Corp.*, 78 F. (2d) 491, is in conflict with the decision made in this case by the Circuit Court of Appeals for the First Circuit.

Judge Mahoney in the Circuit Court of Appeals proceeding in this case (R. p. 95) very carefully pointed out that the *Argyle-Lake Shore* case is not in conflict. The Illinois statute on Revenue provided for the sale of the property on which there were delinquent taxes and further provided that real property so sold might be redeemed within two years after such sale, or after the expiration of two years at any time up to the date a tax deed was issued. It was necessary to apply to the State Superior Court after the expiration of the two year period or to the purchaser at the tax sale to obtain his deed. In the *Argyle-Lake Shore* case the two year period after the tax sale expired on September 7, 1934. On September 25, 1934, creditors filed in the federal court a petition for the reorganization of the debtor and it was not until November 13, 1934, that Cook County filed its petition in the State Superior Court for its tax deed. The reorganization court then enjoined

the proceeding in the state court, which as stated above was started subsequent to reorganization proceeding. Consequently, the *Argyle-Lake Shore* case is not in conflict.

The petitioner also cites as a case in conflict a District Court case, the *Hotel Charles* case, 12 F. Supp. 19 (D. Mass. 1935). (See subsequent proceedings at 12 F. Supp. 734 [D. Mass. 1935] and 84 F. [2d] 589 [C.C.A. 1st] 1936.) No state court proceeding existed before the reorganization proceeding in the *Hotel Charles* case. The city petitioned the reorganization court for leave to go into the Land Court to foreclose its tax lien, but the reorganization court, as the court that first obtained jurisdiction, retained it.

CERTIORARI DENIED IN SIMILAR CASES—LAW IS SETTLED BY DECISION OF STRATON v. NEW, 283 U. S. 318.

There is but slight difference between a proceeding to foreclose a statutory right of redemption and one to foreclose a mortgagor's interest in property. As the Circuit Court of Appeals held (R. p. 93), both come within the doctrine of *Straton v. New*, 283 U. S. 318. And this Court has denied certiorari in cases concerning real estate mortgage or other lien foreclosures where the issue was the same as the issue in this case, to wit, that prior jurisdiction by a state court over the res is not divested by subsequent bankruptcy proceedings. Those cases are:

Muffler v. *Petticrew Real Estate Co.*, (6th Cir.) 132 F. (2d) 479. Certiorari denied June 7, 1943, 319 U.S. 766.

Heffron v. *Western Loan and Building Co.*, (9th Cir.) 84 F. (2d) 301. Certiorari denied November 16, 1936, 299 U.S. 597.

Bryan v. *Speakman*, 53 F. (2d) 463 (5th Cir.). Certiorari denied February 23, 1932, 285 U. S. 539.

In Re Maier Brewing Co. Inc., 65 F. (2d) 673 (9th Cir.). Certiorari denied November 20, 1933, 290 U. S. 695.

The other cases cited on page 24 of this brief show that the Circuit Courts of Appeals apply the law involved with unanimity. And this Court in the clear and forceful language appearing in the last paragraph of *Straton* v. *New*, 283 U. S. 318, at 331, certainly has settled the law involved.

THE MATTER OF FORFEITURE

Throughout the petition for a writ of certiorari and the petitioner's brief, he appeals that a forfeiture is involved. In addition to what Judge Mahoney wrote in the Circuit Court of Appeals decision (R. pp. 96 and 97), the respondent would like to point out (1) that nowhere in the record is it contended that the taxes were not legally assessed and levied; (2) that under the law of Massachusetts the taxpayer is given every opportunity to appeal to the Appellate Tax Board (*City of Springfield* v. *Hotel Charles*, 84 F. [2d] 589, 591) for abatement of taxes if he considers the valuation too high; (3) that if he fails to pay a real estate tax for one year, the collector's sale or taking does not take place until the following year and then two years must elapse before the town can proceed in the Land Court to foreclose the property (Massachusetts General Laws [Ter. Ed.] c. 60, s. 65, quoted in Appendix) and then the Land Court is empowered (General Laws [Ter. Ed.] c. 60, s. 68, quoted in Appendix), after hearing the parties, to extend the time allowing the party to redeem. From the decree of the Land Court,

appeal may now be taken by way of exceptions to the Supreme Judicial Court (General Laws [Ter. Ed.] c. 231, s. 113) and from decisions of the Appellate Tax Board to the highest court (General Laws [Ter. Ed.] c. 58A, s. 13). The record discloses that the bankrupt never filed petitions for abatement of taxes with the assessors nor filed appeals with the Appellate Tax Board questioning the amount of the taxes levied.

The bankrupt had from October 1, 1938, until June 14, 1944,—five years and seven months—to pay its taxes and redeem its property. The holders of the $108,000 mortgage (R. p. 69) could also have redeemed in that period (General Laws [Ter. Ed.] c. 60, s. 58). The fact that the Land Court judge (sometimes by stipulation) gave the taxpayer two years to redeem after the case was ripe for decree in the Land Court demonstrates the fairness of the judge and of the Town in dealing with the taxpayer.

True the taking of a taxpayer's property is a forfeiture. But the federal government as well as state and local governments have to employ lien, distraint and forfeiture measures to collect their taxes. (26 U.S.C. s. 3670 to 3726, inclusive.) The power of the state to tax and raise revenue is essential to its political existence and the essence of the prosperity of the state. (*Nicol* v. *Ames*, 173 U. S. 509, 515.) The state is left to choose its own methods of taxation and the form and manner of enforcing payment of the public revenues subject, so far as the federal power is concerned, to the restricting regulations of the Constitution of the United States; and state laws permitting the taxpayer to appear and be heard at some stage of the proceedings have been held to satisfy the requirements of due process of law. *Kentucky Union Company* v. *Common-*

wealth of Kentuky, 219 U. S. 140; *Security Trust and Safety Vault Co* v. *Lexington*, 203 U. S. 323.

Massachusettsgives its taxpayers ample opportunity to be heard before its administrative boards and its courts not only on questions relating to the tax itself but the means ofcollection. The bankrupt availed itself of the opportunities offered concerning redemption of its lands from the tax title, and was given patient and thoughtful consideration by the Land Court and the Town.

CONCLUSION

The decision of the Circuit Court of Appeals is so clearly correct that no further review would be warranted. The petition for a writ of certiorari should therefore be dened.

Respectfully submitted,

TOWN OF AGAWAM

By DONALD M. MACAULAY

Its Attorney.

March, 1947

APPENDIX

UNITED STATES CONSTITUTION

Article 1, Section 8. "The Congress shall have power . . . to lay and collect taxes, duties, imposts and excises . . . to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

BANKRUPTCY ACT

Section 2 (a) (15)—U. S. Code, Title 11, Chapter 2, Section 11. "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—."

"Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;—."

Section 11e—U. S. Code, Title 11, Section 29e. "A receiver or trustee may within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any

claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding on any claim, or presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period has not expired at the date of the filing of the petition in bankruptcy, the receiver or the trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be."

Section 67 (a-1)—U. S. Code, Title 11, Chapter 7, section 107 (a-1). "Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act. *Provided, however*, That if such person is not finally adjudged a bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed

reinstated with the same effect as if it had not been nullified and voided."

Since the decree of confirmation of the reorganization plan and the consummation of the plan were before June 22, 1938, the effective date of the Chandler Act, the old Section 77B (Act of June 7, 1934) applied.

Subsection "a" of old section 77B provided that the court "shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall and may exercise all the powers, not inconsistent with this section, which a Federal Court would have had it (a) appointed a receiver in equity of property of the debtor by reason of its inability to pay its debts as they mature." (See U. S. C. A., Title 11, s. 511.)

Subsection h of old Section 77B (now under Chandler Act, U. S. C. A., Title 11, Sections 624, 626, 627, 628) reads as follows:

"(h) Upon final confirmation of the plan, the debtor and other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge, and the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations provided for by the plan, or, if no trustee has been appointed, when retained by the debtor pursuant to the plan or transferred by it to the other corporation or corporations provided for by the plan, shall be free and clear of all claims of the debtor,

its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the court may direct the trustee or trustees, or if there be no trustee, the debtor and any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may direct the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any, making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Such final decree shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid."

GENERAL LAWS OF MASSACHUSETTS TERCENTENARY EDITION CHAPTER 60

Section 37. Lien of Tax upon Real Estate, Levy by Sale, Validity of Title.—Taxes assessed upon land, including those assessed under sections twelve, thirteen and fourteen of chapter fifty-nine, shall with all incidental charges and fees be a lien thereon from January first in the year of assessment. Said taxes, if unpaid for fourteen days after demand therefor, may, with said charges and fees, be levied by sale or taking of the real estate, if the lien or liens thereon have not terminated.

Section 53. Taking for Taxes; Notice.—If a tax on land is not paid within fourteen days after demand

therefor and remains unpaid at the date of taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published, and shall conform to the requirements of section forty. He shall also, fourteen days before the taking, post a notice so conforming in two or more convenient and public places.

Section 54. Instrument of Taking, Form, Contents, Effect.—The instrument of taking shall be under the hand and seal of the collector and shall contain a statement of the cause of taking, a substantially accurate description of each parcel of land taken, the name of the person to whom the same was assessed, the amount of tax thereon, and the incidental expenses and costs to the date of taking. Such an instrument of taking shall not be valid unless recorded within sixty days of the date of taking. If so recorded it shall be prima facie evidence of all facts essential to the validity of the title so taken, whether the taking was made on or before as well as since July first, nineteen hundred and fifteen. Title to the land so taken shall thereupon vest in the town, subject to the right of redemption. Such title shall, until redemption or until the right of redemption is foreclosed as hereinafter provided, be held as security for the repayment of said taxes with all intervening costs, terms imposed for redemption and charges, with interest thereon, and the premises so taken, both before and after either redemption or foreclosure, shall also be subject to and have the benefit of all easements and restrictions lawfully existing in, upon or over said land or appurtenant thereto, and,

except as provided in section seventy-seven, all covenants and agreements running with said premises either at law or in equity, when so taken.

Section 64. Tax Title to Be Absolute after Foreclosure.—The title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption by decree of the land court as provided in this chapter. The land court shall have exclusive jurisdiction of the foreclosure of all rights of redemption from titles conveyed by a tax collector's deed or a taking of land for taxes, in a proceeding provided for in sections sixty-five to seventy-five, inclusive.

Section 65. Petition for Foreclosure of Rights of Redemption under Tax Title.—After two years from a sale or taking of land for taxes, except as provided in section sixty-two, whoever then holds the title thereby acquired may bring a petition in the land court for the foreclosure of all rights of redemption thereunder. Such petition shall be made in the form to be prescribed by said court and shall set forth a description of the land to which it applies, with its assessed valuation, the petitioner's source of title, giving a reference to the place, book and page of record, and such other facts as may be necessary for the information of the court. Two or more parcels of land may be included in any petition brought by a town, whether under a taking or as purchaser of such title or titles, if such parcels are in the same record ownership at the time of bringing such petition.

Section 66. Examination of Title, Notice, etc.—Upon the filing of such a petition the court shall forthwith cause to be made by one of its official examiners an

examination of the title sufficient only to determine the persons who may be interested in the same, and shall upon the filing of the examiner's report notify all persons appearing to be interested, whether as equity owners, mortgagees, lienors, attaching creditors or otherwise, of the pendency of the petition, the notice to be sent to each by registered mail and return of receipt required, the addresses of respondents, so far as may be ascertained, being furnished by the petitioner. Such other and further notice by publication or otherwise shall be given as the court may at any time order. The notice, to be addressed "To all whom it may concern," shall contain the name of the petitioner, the names of all known respondents, a description of the land and a statement of the nature of the petition, shall fix the time within which appearance may be entered and answer filed, and shall contain a statement that unless the party notified shall appear and answer within the time fixed a default will be recorded, the petition taken as confessed, and the right of redemption forever barred.

Section 68. Answer, Offer to Redeem, Finding of Court for Redemption.—Any person claiming an interest, on or before the return day or within such further time as may on motion be allowed by the court, shall, if he desires to redeem, file an answer setting forth his right in the land, and an offer to redeem upon such terms as may be fixed by the court. Thereupon the court shall hear the parties, and may in any case in its discretion make a finding allowing the party to redeem, within a time fixed by the court, upon payment to the petitioner of an amount sufficient to cover the original sum, costs, interest at the rate of six and one half per cent per annum, and all subsequent taxes, costs and

interest to which the petitioner may be entitled under section sixty-one or sixty-two, together with the costs of the proceeding and such counsel fee as the court deems reasonable. The court may impose such other terms as justice and the circumstances warrant.

Section 69. Decree Barring Redemption, When.—If a default is entered under section sixty-seven, or if redemption is not made within the time and upon the terms fixed by the court under the preceding section, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claim, or if upon hearing the court determines that the facts shown do not entitle him to redeem, a decree shall be entered which shall forever bar all rights of redemption.

CHAPTER 185

Section 1. The land court shall be a court of record. It shall have exclusive original jurisdiction of the following matters:

(b) Proceedings to foreclose tax titles, under chapter sixty.

CHAPTER 231

Section 135. Preparation and Transmission of Necessary Papers to Full Court of Supreme Judicial Court; Entry of Case. . . . . In order to carry any question of law from the supreme judicial court when held by a single justice or from any other court to the full court of the supreme judicial court upon appeal, exception, reservation, report or otherwise as authorized by law, the party having the obligation to cause the necessary papers hereinbefore specified to be prepared shall give

to the clerk, recorder, register or other appropriate official of the court in which the case is pending, within ten days after the case becomes ripe for final preparation and printing of the record for the full court, an order in writing for the preparation of such papers and copies of papers of transmission to the full court of the supreme judicial court. As soon as may be after receiving such written order, the clerk or other official shall make an estimate of the expense of the preparation and transmission of the necessary papers and copies of papers aforesaid and shall give such party notice in writing of the amount of such estimate. Such party, within twenty days after the date of such notice from the clerk or other official, shall pay to him the amount of such estimate and such further amount beyond such estimate as the clerk or other official may find to be then due for such preparation. The clerk or other official then without delay shall prepare the papers and copies of papers aforesaid for transmission and when they are ready shall give notice in writing of such fact to the party ordering them, who, within five days after the date of such notice, shall pay to the clerk or other official any balance then due therefor and shall enter the case in the supreme judicial court for the commonwealth, or for the proper county. The court in which the case is pending, or any justice or judge thereof, may, for cause shown after hearing, extend the time for doing any of the acts required by this paragraph. The entry of the case shall not, except as otherwise provided by law, transfer the case, but only the question to be determined.